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Recent Developments Again Call for Timely Review of Restrictive Covenants

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We have suggested that employers should view non-competition and other restrictive agreements as "live" documents, warranting regular examination to ensure they are deployed with appropriate precision and account for frequent legal developments. Four such recent developments once again suggest that a review, and most likely revision, of your confidentiality, trade secret, and non-competition agreements would be a timely and appropriate exercise to undertake.

First, the Defend Trade Secrets Act of 2016 (DTSA) requires that certain whistleblower protection language, allowing the disclosure of trade secrets in certain circumstances and under certain conditions, be included in agreements. If such language is not part of new agreements, an employer may not recover exemplary damages or attorney fees for a trade secret violation under the DTSA.

Second, both the Obama administration and state agencies have signaled a growing hostility toward non-competition agreements. In May 2016, the White House issued an analysis suggesting that non-compete agreements are overused and may hurt the economy. Multiple states have followed suit. For example, a publisher recently agreed to eliminate non-compete agreements as part of a settlement with New York authorities.

Third, the National Labor Relations Board (NLRB) and other federal agencies have condemned confidentiality provisions that discourage employees from engaging in protected concerted activity, or reporting a violation of the law.

Fourth, and finally, individual states are passing or updating restrictive covenant statutes to address changing policy objectives. For example, Utah recently passed a new statute limiting non-compete agreements entered into after May 10, 2016, to no more than one year in duration for businesses with over 20 employees. The Utah law also requires employers to pay the attorney's fees and other costs if they are unsuccessful in obtaining enforcement. By contrast, Idaho has recently amended its non-compete statute to shift the burden of proof to restricted employees to show they have no ability to harm their previous employer's legitimate economic interests. This revision goes into effect next month.

For all of these reasons, employers would be wise to take a fresh look at their employment policies and agreements containing restrictive covenants. This review should include:

1. Adding language that complies with the DTSA whistleblower immunity provision

2. Modifying language to promote compliance with the directives of the NLRB and other agencies

3. Adding language – such as a requirement that departing employees answer questions about subsequent employment – that enhances practical enforceability

4. Examining the existing approach to non-competition agreements, including who signs such agreements and what activity is restricted

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